UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHEROKEE NATION, and CHEROKEE NATION ENTERTAINMENT, LLC,	)	
Plaintiffs,	)	
vs.	)	
S.M.R. JEWELL, *in her official capacity as* **Secretary of the Interior U.S. Department of the Interior, et al**	)	**Case No. 12-CV-493-GKF TLW**
Defendants,	)	
UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION,	)	
Intervenor Defendant(s).	)	

PLAINTIFFS' REPLY BRIEF

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INTRODUCTION

Plaintiffs, Cherokee Nation and Cherokee Entertainment, LLC., brought this action challenging the Department of Interior's ("DOI") July 30, 2012 Decision ("2012 Decision") to take a 2.03 acre tract of land ("Gaming Tract") in trust for the United Keetoowah Band of Cherokee Indians federally-chartered corporation ("UKB Corporation"). UKB Corporation and United Keetoowah Band of Cherokee Indians ("UKB") both joined this action as Intervenors. In Plaintiffs' Merits Brief (the "Opening Brief"), Plaintiffs alleged, *inter alia*, that DOI abused its discretion and erred as a matter of law in finding that the Cherokee Nation and UKB shared a "former reservation" and in concluding DOI could take land into trust for the UKB Corporation.

In response, Intervenors assert that "Plaintiffs parrot an oversimplified version of a complex history, in a way that mocks the ASIA's plain desire to correct an historic wrong." However, it is DOI who has created a mockery of the historical 180-year relationship between the Cherokee Nation and the United States. And it is Intervenors who make a mockery of historical facts when they state that the 2012 Decision "honors treaty obligations by ending their misapplication and allowing . . . [the UKB] govern themselves on their respective lands.". (Intervenor-Defs.' Resp. Br. ("UKB Br.") at 1.) The UKB did not exist as a recognized tribe until 1946.[1] The UKB and the UKB Corporation were not organized until 1950.

Intervenors have no "respective lands" arising from "treaty obligations." DOI's conclusion to the contrary is in conflict with the long-settled precedent and is thus arbitrary and capricious. The 2012 Decision must be set aside by this Court.

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[1] DOI states: "In 1859, the Keetoowahs . . . adopted a constitution and formed the Keetoowah Society. (Federal Defs.' Resp. Br. ("DOI Br.") at 1.) This statement means absolutely nothing. There was no Keetoowah tribe in 1859. The Society—whatever it was—was not a Tribe recognized in any treaties with the United States.

HISTORICAL BACKGROUND

DOI states that "members of the UKB are descendants of the Cherokee people." (DOI Br. at 5.) DOI also correctly states that the "Five Civilized Tribes, including the Cherokees, were given fee title to their land within the Indian Territory." (*Id.*) According to DOI, in 1859 "the leading members" of the Keetoowahs adopted a constitution and formed the Keetoowah Society, whose membership was "initially limited to full-blood Cherokees." (*Id.* at 5 (citing H.R. Rep. No. 77-447 at 2).) However, DOI fails to note that such "Society" did not have a government-to-government relationship with the United States, and was not a party to the 1866 Treaty reaffirming the Cherokee Nation's earlier treaty rights. (*See* DOI Br. at 5-7.)

DOI cites no support for its statement that the "Keetoowahs" unsuccessfully opposed allotment of the Cherokee lands, "as well as efforts to dissolve the governments of the Five Civilized Tribes, including the Cherokee." (DOI Br. at 5.) DOI implies, incorrectly, that Cherokee Nation leaders did not make such efforts. DOI also implies, incorrectly, that the governments of the Five Tribes were dissolved. The UKB tries to perpetuate the "dissolution" myth by stating: "Faced with the mandated end of the Cherokee Nation government, the Keetoowah Society, in 1905, adopted a new constitution and secured a federal charter so they could continue to 'provide a means for the protection of the rights and interests of the Cherokee people in their lands and funds.'" (UKB Br.. at 5; *see also* DOI Br. at 5-6.) Neither DOI nor the UKB offer any plausible explanation as to how their description of the UKB "society" is relevant to the legal history of the Cherokee Nation and its relationship with the United States documented in the Opening Brief. (*See* Pls.' Br. at 2-8.)

In its brief, the UKB offers the following statement from W.W. Keeler, Vice-Chairman of the Executive Committee of the Cherokee Nation (and later Chief of the Cherokee Nation),[2] in support of the Keetoowah's desire to organize under the OIWA:

> I feel sure that this present Government organized Executive Committee of the Enrolled Cherokee will recommend that the Keetoowahs be recognized. I, for one, would be willing to go a step farther and recommend that the present Executive group be dissolved and the Keetoowah organization be the sole representative with the Government of the Cherokees of Oklahoma.

(UKB Br. at 6.) The letter clearly shows that the Cherokee Nation was acting in its governmental capacity in 1946 and UKB has failed to show—and cannot show—that the Cherokee Nation government dissolved so that the Keetoowah could be the Cherokee Nation's representative with the Government of the "Cherokees of Oklahoma." This letter also mitigates against DOI's findings that the Cherokee Nation and the UKB share a "former reservation" for IGRA purposes.

The UKB next engages in additional fictional revisionist history when it states:

> Those Cherokees not enrolled or unable to enroll with the UKB, but who desired to re-establish a regime of self-governance, re-organized and in June 1976 adopted the Constitution of the CNO. As the ASIA recognized [in the June 2009 Decision], the CNO is distinct from the historic Cherokee nation as, [sic] evidenced by "significant political differences in governmental organization between this historical CN and the CNO which render the CNO a new political organization."

(UKB Br. at 7 (quoting AR 508).)[3] DOI has since backed down from that position. "*The ASIA* noted [in the July 2009 Decision] that the June 24 decision did not render a finding on whether UKB was a successor-in-interest and *did not make any binding findings regarding the status of the historic Cherokee Tribe*." (DOI Br. at 10 n. 1.) As stated in the Nation's Opening Brief, the

[2] The letter is not a part of the Administrative Record but the quote is taken from a brief filed by the UKB in a difference action. *See* AR1611.

[3] The quote is to page 3 of the Secretary's June 24, 2009 Decision in the 76-acre case.

courts have consistently held that the Cherokee Nation was never dissolved and thus there has been no "re-establishment" or "re-organization" as claimed by the UKB.

Finally, the UKB states:

> There is no indication that the UKB organized under the impression, knowledge, or intention that doing so would relinquish Keetoowah rights in the lands of the former Cherokee reservation or their rights as Cherokee Indians, given that its members would be of the highest blood quantum. Nor is there any evidence that, all the time of the UKB's formal federal recognition, either the DOI or Congress intended that such re-organization would result in the forfeiture of its rights in the lands of the former Cherokee reservation or any of its rights as Cherokee Indians.

(UKB Br. at 7.) The Keetoowah Society, the group recognized as the UKB in the 1946 Act, had no governmental right in the lands of the reservation. That right, before and after 1946, resides solely with the Cherokee Nation. (See Pls.' Br. at 27-34.) Further, the Keetoowah Society did not "re-organize" but rather was allowed to organize for the first time under the OIWA. The Keetoowah Society forfeited no right that it had to the lands of the Cherokee Nation because the Keetoowah Society had no rights in the land. Further, if Congress had intended for the UKB to have a greater right, it certainly knew how to grant that right. See Act of Aug. 10, 1946, 60 Stat. § 2 (setting aside "for the use and benefit of the Indians of the Cheyenne and Arapaho Reservation in Oklahoma the remainder of lands comprising the diminished Seger School Reserve"). Yet, Congress did not set aside any land for the UKB.

DOI states the "UKB believed that the parcel on which the [illegal UKB] gaming facility is located was "Indian lands" because, *inter alia*, its corporate charter restricts the tribe from alienating its lands." (DOI Br. at 7.) What UKB may have believed—or imagined for its own benefit—simply is not relevant. UKB was told from the beginning that it had no "Indian lands"

upon which it could lawfully game under IGRA. (*See* Pls.' Br. at 9.)[4] In any event, the illegal gaming facility was finally closed on August 30, 2013, as a result of litigation between the State of Oklahoma and the UKB. Doc. 121, AR5087.

STANDARD OF REVIEW

Although DOI does not dispute the standard of review described by the Cherokee Plaintiffs (Pls.' Br. at 13-14), DOI argues that deference must be given to the 2012 Decision based on its "expertise" and discretion.[5] However, as shown in the Opening Brief (at 13-15) and recognized by the Court in the Preliminary Injunction ruling, DOI's interpretations are not entitled to deference here because they are plainly erroneous, inconsistent with DOI's own regulations, and contrary to law.

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[4] DOI also states that "[t]hroughout the 1990s, the NIGC regulated the facility, requiring the UKB to make payments and reports pursuant to IGRA." This is simply inaccurate. The 2011 NIGC general counsel memorandum cited by DOI states that although the UKB began making payments to NIGC in 1991, "[n]o regulatory action on the part of the federal government identified which gaming operations were 'within the jurisdiction of the Commission.' Rather, each operation was to self-identify and send its own fee worksheets and payments to the NIGC." Doc. 121, AR5083. The same memorandum makes clear that "the NIGC's contacts with the UKB have been very limited and have not dealt with the regulation of the UKB's ongoing activities." Doc. 121, AR5086.

[5] DOI argues that the standard is narrow and the reviewing court must not substitute its judgment for that of the agency. (DOI Br. at 17 (citing *Colo. Wild v. USFS*, 435 F.3d 1204, 1213 (10th Cir. 2006).) It contends that the APA standard is "highly deferential" and "presumes the agency's action to be valid." (*Id.* (citing *Envtl. Def. Fund, Inc. v. Castle*, 657 F.2d 275, 283 (D.C. Cir. 1981).) Finally, DOI asserts that there is a strong presumption in favor of upholding decisions where agencies have acted within the scope of expertise. *Id.* (citing *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 376 (1989)). The Tenth Circuit has acknowledged the presumption in *Marsh* but held that the "agency action may be overturned if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *The Ecology Center v. U.S. Forest Serv.*, 451 F.3d 1883, 1189 (10th Cir. 2006) (remanding to the district court with instructions for the court to enter an order vacating the Forest Service's approval of a project); *see also Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (when an agency has "failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action.").

ARGUMENTS AND AUTHORITIES

I. DEFENDANTS FAIL TO REFUTE PLAINTIFFS' POSITION THAT NO STATUTORY AUTHORITY EXISTS FOR PLACING LAND INTO TRUST FOR UKB CORPORATION.

The administrative record clearly demonstrates DOI erred in determining it had the statutory and regulatory authority to take the Gaming Tract into trust for the UKB Corporation. DOI sums up its position as follows:

> As Interior recognized, because a tribe incorporated under the OIWA has the right to petition for land to be held in trust, it necessarily follows that the Secretary has the corresponding authority to take the land in trust for an incorporated tribe. Thus, Interior reasonably determined that it had statutory authority to take land into trust for the UKB Corporation, a determination to which deference is due.

(DOI Br. at 28.) Citing *City of Arlington v. Federal Communications Commission*, 133 S.Ct. 1863 (2013), DOI argues that the Court should "defer[] to agency interpretation of statutory ambiguity concerning agency's jurisdiction." (*Id.*) In *City of Arlington*, the central issue was whether the FCC had received Congressional authority to exercise jurisdiction over the subject matter. That is not the issue in this case. Plaintiffs are not challenging the Department's *jurisdiction* to take land into trust. Rather, Plaintiffs assert DOI lacked the statutory and regulatory authority to take land into trust for the UKB Corporation.

A. The ASIA's Decision Was an Attempt to Circumvent the Ruling in *Carcieri v. Salazar*.

Remarkably, DOI argues that Interior's decision to take the land into trust for the UKB Corporation was *not* an attempt to circumvent *Carcieri* because, DOI contends, *Carcieri* does not apply to tribes organized under the OIWA. (DOI Br. at 28-29) ("OIWA thus confers to tribes incorporated under the OIWA the IRA rights generally; it does not differentiate between tribes organized before or after 1934, which would make little sense in a 1936 statute authorizing the

tribes to reorganize.".) DOI's position then begs the question: Why did the ASIA not take the land into trust for the UKB, which filed the original request?

Indeed, the ASIA's own actions support the logical conclusion that DOI was circumventing *Carcieri*. In the June 2009 Decision, while considering the 76-acre tract trust application, the ASIA issued a decision finding that "I have authority to take land into trust [for the UKB] pursuant to Section 5 of the IRA." Doc. 35-4, AR 3237. Yet, the ASIA further determined that "I must defer final decision on whether I have authority to take this land into trust for the UKB until the Department has developed a more comprehensive understanding of *Carcieri* and its impact on tribes throughout the country." *Id.* In the July 2009 Decision, the ASIA asked the UKB, the Cherokee Nation and the Regional Director for the EORO to address "the issue of the import, if any, of the *Carcieri v. Salazar* Decision." Doc. 35-4, AR 3249. In the September 2010 Decision, the ASIA stated "[u]nder Section 5 of the IRA, I can take land in trust for "Indians"—but not for tribes. Doc. 35-4, AR 3254. Thus, the ASIA had determined that, under *Carcieri*, he lacked authority to take land into trust for the UKB. However, instead of immediately denying the UKB applications on the 76-acre tract and the gaming tract, the ASIA immediately began formulating the scheme to circumvent the clear language of *Carcieri* as described by Plaintiffs in their Opening Brief. (Pls.' Br. at 15-17.)

Now, DOI asserts that "*Carcieri* does not pose an obstacle to having and taking land in trust for tribes federally recognized after 1934." (DOI Br. at 31.) Instead, it claims that the ASIA changed course post-*Carcieri* only to avoid the "complex analysis" required to determine whether a tribe was "under federal jurisdiction" in 1934.

Even if one accepts DOI's assertion (which is not supported by the record, *see* Pls.' Br. at 17-20), the simple truth is that after *Carcieri* was decided, the ASIA opted not to take the land

into trust for the UKB. Thus, the decision under review in this case is the ASIA's arbitrary and erroneous finding that section 3 of the OIWA authorized the Department to take land into trust for the UKB Corporation.[6]

B. DOI Erred in Finding that Section 3 of the OIWA Authorizes the Acquisition of Trust Land for the UKB Corporation.

DOI states that section 3 of the OIWA vested in tribal chartered corporations the right "to enjoy any other rights or privileges secured to an organized Indian tribe" under the IRA. (DOI Br. at 3.) While the IRA excluded specifically named Oklahoma tribes—including the Cherokee—from certain provisions of the Act, sections 465[7] and 479 of the IRA continued to apply to the named Oklahoma Indian tribes. In *Carcieri*, the Supreme Court limited the definition of "Indian" in section 479 of the IRA to "members of tribes under Federal jurisdiction when the IRA was enacted in 1934." (DOI Br. at 3.) The UKB did not exist in 1934 and thus could not have been under federal jurisdiction.

DOI contends that the 1946 Act recognizing the UKB "was intended 'to secure any benefits, which, under the [OIWA], are available to other Indian bands or tribes.'" (DOI Br. at 4 (quoting statement of Abe Fortas, Acting Secretary of the Interior, contained in H.R. Rep. No. 79-447, at 2 (1945)).) As previously discussed, the 1946 Act merely states that "the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the [OIWA]." It does not grant statutory authority

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[6] Intervenors' response essentially mirrors the DOI response. However, Intervenors devote approximately two pages of their brief to arguing that "Plaintiffs have asserted that the 2012 Decision is contrary to law because *Carcieri* bars trust acquisitions for the UKB, but this issue was not decided by the ASIA and is therefore not before the Court. (*See* UKB Br. at 17.) The administrative record clearly shows DOI did decide *Carcieri's* application to the UKB and attempted to circumvent the impediment *Carcieri* placed in the UKB application.

[7] DOI describes section 465 as the "capstone"[7] of the IRA. (DOI Br. at 2.)

to take land into trust but rather "applied OIWA § 503 to the UKB and was intended to secure the UKB "any other rights or privileges" secured to an organized Indian tribe under the IRA." (DOI Br. at 14 (quoting the 2010 Decision).)

Although DOI concedes that "section 3 does not explicitly authorize the ASIA to take land in trust," it argues that such authority is "implicit." (DOI Br. at 15.) This conclusion directly contradicts DOI's own regulations which provide that a tribal corporation may secure land into trust only when "specifically" authorized by statute. 25 C.F.R. § 151.2(b). No such specific statutory authorization exists here.

DOI claims"[i]t is beyond dispute that when the UKB organized in 1950, the Band and the Assistant Secretary, in approving the charter, anticipated that the UKB would hold tribal trust property." (DOI Br. at 13 (quoting June 2009 Decision).)[8] This is irrelevant. The corporate charter does not specifically address trust property, and even if it did, it is no substitute for the specific *statutory* authority required for taking land into trust.

DOI next argues that because the OIWA authorizes taking land into trust for a tribe, it "necessarily follows" that it can take land into trust for the tribe's corporation. But this interpretation flies in the face of Interior's own comments to the final regulatory definition of "tribe" in 25 C.F.R. § 151.2(b). There, Interior expressly acknowledged that the IRA and the OIWA *do not* provide statutory authority for trust acquisitions for federal chartered corporations where such statutory authority does not otherwise exist. *See* 45 Fed. Reg. 62034 (Sept. 18, 1980). 17-20 Again, DOI has identified *no specific statutory authority* for taking land into trust for the UKB Corporation.[9]

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[8] The Secretary errs in crediting the quote to the July 2009 Decision.

[9] Indeed, DOI acknowledges there is no express statutory for the trust acquisition. "[H]ere, while the authority to take land in trust is *implicit*—in that it is *not expressly stated*—it is *implied*

In the 2012 Decision, the ASIA stated that "Section 3 of the OIWA, 25 U.S.C. § 503, *implicitly* authorizes the Secretary to take land into trust for the UKB Corporation."[10] Doc. 28-4, AR22. Continuing to urge this position, DOI now further contends that "something may be both 'specific' and 'implicit.'" *Id.*

According to the Merriam-Webster Online Dictionary, "implicit" means "capable of being understood from something else though unexpressed." "Specific" means "free from ambiguity." The cases cited by DOI are not persuasive. 25 C.F.R. § 151.2(b) does not confer upon the Secretary the "implicit" authority to take land into trust for a corporation chartered under section 3 of the OIWA. Further, section 3 of the OIWA, as discussed above and in Plaintiffs' Opening Brief, does not confer implicit or explicit authority to the Secretary to take land into trust for the UKB Corporation. Thus, the ASIA exceeded his authority by taking the Tract into trust for the UKB Corporation.

C. The ASIA Fails to Demonstrate that it Followed DOI's Regulations and Policies When Placing the Tract in Trust for the UKB Corporation.

DOI cannot dispute that 25 C.F.R. § 151.9 requires that a "Tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary." Nor can it dispute that the UKB submitted the application at issue here *on behalf of* the UKB

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from the very specific and express grants of the rights and privileges available under the IRA. (DOI Br. at 33 (emphasis added).)

[10] In the 2010 Decision, the ASIA noted that section 3(r) of the UKB Corporation's charter authorizes the UKB Corporation to acquire "[p]roperty of every description, real and personal," and interpreted that provision as authorization of the Secretary to take land into trust for the Corporation. The ASIA seemingly fails to understand that the UKB Corporation charter alone cannot authorize trust acquisitions by the UKB Corporation unless such acquisitions are specifically authorized by law. (*See* DOI Br. at 28.)

Corporation.[11] Thus, the purported "Tribe desiring to acquire land in trust status" did not itself file the written request for approval. DOI dismisses this as a mere technicality but cites no authority supporting its claim that the clear language of the regulation may be ignored.[12]

It was a clear abuse of discretion for the ASIA to process the UKB application in a manner not in conformity with his own regulations and rules as set forth in 25 C.F.R. § 151.1, *et. seq*, and the Handbook.[13]

II. DEFENDANTS HAVE NOT ESTABLISHED AS A MATTER OF LAW THAT UKB SHARES THE CHEROKEE NATION'S "FORMER RESERVATION."

A. Defendants Have Not Provided Sufficient Legal Support for DOI's Conclusion that the UKB Shares the Cherokee Nation's "Former Reservation."

In support of the ASIA's determination that the Tract constitutes "Indian lands" under IGRA, DOI inexplicably relies upon the June 2009, July 2009, and September 2010 Decisions.

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[11] In fact, DOI has never recognized the legal distinction between the two. In the Notice of intent to acquire the land into trust published in the Federal Register, the Secretary states in one part of the notice that the land will be taken into trust for the "United Keetoowah Band of Cherokee Indians of Oklahoma" and in another section of the notice states the land is to be taken into trust for the "United Keetoowah Band of Oklahoma Corporation." Doc. 2, Ex. 2.

[12] DOI cites *County of Charles Mix v. U.S. Department of Interior*, 799 F. Supp. 2d 1027, 1041 (D.S.D. 2011), *aff'd* 674 F.3d 898 (8th Cir. 2012) as support for the proposition that the UKB could submit the application on behalf of the UKB Corporation. In *County of Charles Mix*, the issue raised concerning section 151.9 was whether the regulation required "that the Tribe in a Tribal Council of all members, as opposed to the [Business and Claims]Committee [the nine member elected executive committee], be the entity requesting that land be taken into trust." The issue was not about which of two entities must make the application but rather which of two competing branches of government of the tribal entity had the right to bring the application *on behalf of* the tribe.

[13] *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) ("[T]he Secretary . . . was bound by the regulations which he himself had promulgated . . . ."); *Utahans for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure."); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (stating, with regard to the BIA, that "[a]n agency is required to follow its own regulations."); *A.D. Transport Express, Inc. v. U.S.*, 290 F.3d 761, 766 (6th Cir. 2002) ("When an agency promulgates regulations it is, however, bound by those regulations.").

DOI makes this argument despite the fact that it acknowledges—as it must—that the 2012 Decision was *the first time* that DOI adopted the theory that the Cherokee Nation's "former reservation" was also the "former reservation" of the UKB. (DOI Br. at 8.) Yet DOI argues that it relied on the June 2009 Decision to support its conclusion that the two tribes "could avail themselves of the same former reservation for IGRA purposes." (DOI Br. at 9.) DOI also implies that the 2009 Decision made various rulings concerning the status of UKB territorial jurisdiction (*id.* at 10-11), but acknowledges in a footnote that the July 2009 Decision stated that the June 2009 Decision did not (1) render a finding on whether UKB was a successor-in-interest, (2) make any binding findings regarding the status of the "historic" Cherokee Nation, or (3) make findings of law or fact regarding authority to take the land into trust on behalf of the UKB "under any particular theory" (*id.* at 10 n. 1).

Throughout its brief, DOI's repeated mantra is that because the UKB's membership is comprised of members or former members of the Cherokee Nation, it has automatically acquired the Cherokee Nation's governmental authority over Indian country within its Treaty Territory. (*See* DOI Br. at 5, 9,11, 19.)[14] However, the numerous repetitions of that idea throughout the brief do not provide legal authority to support the 2012 Decision's shared reservation concept. DOI relies only on the 1946 Act, the 1994 amendments of IRA § 476, and the 1999 Appropriations Act as legal authority for its position. As already discussed in Plaintiffs' Opening Brief, those laws do not provide a sufficient legal basis to support DOI's theory. Moreover, DOI has previously relied on § 476 of the IRA only in the context of its discussions of regulatory requirements concerning jurisdictional conflicts and has relied on the 1999 Appropriations Act only in the context of its discussion of regulatory requirements for tribal

[14] DOI more artfully mischaracterizes the situation as a one where one federally recognized tribe was "formed" out of another federally recognized tribe.

consent. DOI's attempt to now argue that the 1999 Appropriations Act and § 476 support a shared reservation theory is implausible and inconsistent with its previous decisions.

DOI states that "the 1946 Act imposes no limitations on the UKB's authority, and that it recognizes the UKB's sovereign authority, which extends 'over both [its] members and [its] territory'." (DOI Br. at 11.)[15] This is not supported by the language in the 1946 Act. Section 1 of that Act simply recognizes the Keetoowahs as a "band" residing in Oklahoma for purposes of organizing under section 3 of the OIWA. It does not— expressly or by implication—create, recognize, or even refer to "sovereign authority" or territorial jurisdiction. Thus, the 1946 act could not have vested UKB with authority or jurisdiction that it does not even address. Further, it is more significant that the 1946 act imposes no limitations, express or implied, on the sovereign authority of the *Cherokee Nation*, which is the tribe that possesses treaty-protected rights of self-government within its Treaty Territory.[16]

Rather than providing any legal analysis regarding its "shared reservation" theory, DOI also references one page of the June 2009 Decision's discussion of prior departmental positions on the exclusivity of the Cherokee Nation within the Cherokee Nation Treaty Territory. (DOI Br. at 12.)[17] The referenced June 2009 Decision's discussion appears under the heading "Jurisdictional problems and potential conflicts of land use which arise." In that discussion, the

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[15] DOI incorrectly references the *July* 2009 Decision, but cites pages in the *June* 2009 Decision. See June 2009 Decision, Pls.' Br., App.1, Tab 15, Doc. 35-4, AR3234-3246 [same as AR3631-3643]; and July 2009 Decision, Pls.' Br., App. 1, Tab 16, Doc. 35-4, AR3248-3251. DOI cites the 2012 Decision, Doc. 28-4, AR22, and the 2009 Decision, AR3636-3637, as support for its arguments regarding the 1946 Act. However, those decisions only contain statutory language and conclusory statements.

[16] DOI's reliance on *United States v. Mazurie*, 419 U.S. 544, 557 (1975) is misplaced. The UKB would have to have jurisdiction over a territorial area in order to exercise sovereign authority over a territory.

[17] DOI cites the June 2009 Decision at AR3636. The cited page 6 of the June 2009 Decision is in a duplicate copy of that decision in Pls.' Br., App. 1, Tab. 15, containing Doc. 35-4, AR3234-3246.

ASIA found that he was not required to rely on prior findings of Cherokee Nation exclusive jurisdiction in a 1987 ASIA letter, the *United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla.), May 31, 1991, order, or the *United Keetoowah Band v. Mankiller*, No. 92-C-585-B (N.D. Okla.) January 27, 1993 Order, *aff'd* 2 F.3d 1161 (10th Cir. 1993). According to the June 2009 Decision, those decisions are not controlling, because they "were both decided before Congress passed section 476(f) [of the IRA in 1994] and they were "based on the Department's position at that time that CNO had exclusive jurisdiction.".[18] Plaintiffs have already shown that § 476 does not mandate that DOI must allow one tribe to encroach on the jurisdictional area of another tribe. (Pls.' Br. at 44-45.) DOI's attempt to now use § 476 as support for a shared reservation theory is implausible and inconsistent with its past discussions of that section only within the context of jurisdictional conflicts. Furthermore, this is not a new "policy" requiring no justification as suggested by DOI. (DOI Br. at 24.) It is a change in interpretation of the law that cannot be justified.

DOI states that "'[s]hared jurisdiction is unusual; but it is not unheard of.'" (DOI Br. at 13 (quoting June 2009 Decision) (alteration in original).)[19] DOI then references an April 12, 2009 Regional Director memorandum as support for this proposition. According to DOI, the memorandum provides three land acquisitions as examples of "shared" reservation lands. The histories of these acquisitions do not support DOI's position that the UKB shares the Cherokee Nation's "former reservation."[20] The first tract is located on a 40-acre tract of trust land that is

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[18] The referenced June 2009 Decision also stated that the Law Enforcement and Regional Director September 22 and 26, 2003 letters and October 31, 2002 letter did not address §476(f). Doc. 35-4, AR3239.

[19] DOI errs in crediting the quote to the July 2009 Decision.

[20] DOI also cites a Solicitor's Opinion for the proposition that shared reservations were contemplated under the IRA. *Id.* The Solicitor's Opinion addresses the following question: "whether, under the provisions of the [IRA], devisees other than heirs at law under wills of

the site of an office building for Inter-Tribal Council, Inc., which was formed by several small tribes in northeastern Oklahoma "to assist Native Americans and others in matters concerning mental health, nutrition, education, and employment."[21] The member tribes each purchased an equal undivided interest in the property through the Inter-Tribal Council. The second tract is a 114-acre tract that was conveyed into trust for the same northeastern Oklahoma tribes under authority of the Act of Jan. 2, 1975, 88 Stat. 1920. Finally, DOI references Thlopthlocco Tribal Town land that was acquired under authority of section 1 of the OIWA, 25 U.S.C. § 501, with funds appropriated by the Act of May 9, 1938, 52 Stat. 300, "for the development of an Indian community for the use of the Creek Indians in the [Thlopthlocco Tribal Town] area." *Thlopthlocco Tribal Town and Muscogee (Creek) Nation v. Acting Muskogee Area Director, Bureau of Indian Affairs*, 29 IBIA 241, 255 (July 19, 1996). None of these circumstances are analogous to the UKB's purchase of Tract in fee and DOI's approval of the UKB trust application over the objections of the Cherokee Nation.

B. DOI Has Not Provided Sufficient Legal Support for Its Position that the Cherokee Nation's "Former Reservation" Is the "Former Reservation" of the UKB Under IGRA.

DOI argues that DOI "reasonably" determined that the Tract is within UKB's "former reservation under IGRA." DOI contends that IGRA and DOI regulations are ambiguous as applied to this case, but it fails to explain that contention. (DOI Br. at 20.) Instead, DOI argues that "the only question is whether the UKB, given it [sic] unique history, may claim the same

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restricted Indians must be confined to the Indians of the same reservation without regard to original tribal blood or affiliation." 1 *Op. Sol. on Indian Affairs* 478 (U.S.D.I. 1979). The opinion was written on November 7, 1934, less than five months after enactment of the IRA. The Solicitor concluded that "[r]estricted lands may be devised to Indians who are members of a tribe having recognized jurisdiction over the lands in question." *Id.* at 480. This opinion is hardly support for DOI's 2012 Decision.

[21] *See* http://ninetribes.org/mission_statement.html.

area [Cherokee Nation's Treaty Territory] as its former reservation." (*Id.* at 20.) DOI persists in arguing that "former reservation" status is to "determined by the Secretary," and that regulations "require only that the last reservation be an 'Oklahoma tribe.'" (*Id.*) This ignores the express wording of IGRA, 25 U.S.C. § 2719(a)(2)(A)(i), which requires that the land must be in Oklahoma and "within the boundaries of *the Indian tribe's* former reservation." (Emphasis added). The ASIA's interpretation also is contrary to the wording of the regulations, which defines "former reservation with unambiguous references to reservations established by treaty, Executive Order, or Secretarial Order "for an Oklahoma tribe." 25 C.F.R. Part 292. The Cherokee Nation's Treaty Territory was not established for the Keetoowah Society. It was established for the same Cherokee Nation that has maintained a government-to-government relationship with the United States for more than 200 years.

Moreover, DOI has not attempted to "interpret" its regulatory definition of "former reservation," which clearly requires that the "former reservation" must have been established for the tribe seeking the gaming trust acquisition. Therefore, because the decision is inconsistent with the regulations it purports to apply, it is not entitled to due deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337 (2013).

DOI also tries to broaden the definition of "former reservation" by suggesting that the Governor's concurrence is required for acquisition of lands for gaming purposes after 1988 only "[a]bsent a connection" to "current or historic Indian lands." (DOI Br. at 20.) There is nothing in IGRA or the implementing regulations containing such general and meaningless terminology. Plaintiffs do not dispute the assertion that the "former reservation" exception is intended to allow tribes to "use their historic territories in furtherance of IGRA's purposes of tribal self-

sufficiency." (DOI Br. at 20) However, IGRA does not authorize *any* tribe in Oklahoma to use *another* tribe's historic territory, which would be the end result if DOI were permitted to take the land into trust here.

DOI flies even further afield of the issue at hand in its statement that "the complex circumstances involving the congressional recognition of one tribe that developed from another and the interwoven history and co-existence of the two tribes within the same geographic area particularly implicate Interior's special expertise in Indian affairs." (DOI Br. at 21.) Put simply, there was no UKB tribal government in "co-existence" with the Cherokee Nation before, during, or after removal, including in 1838 when the Treaty Territory was deeded to the Cherokee Nation.

DOI argues that the exceptions that permit trust acquisition for gaming purposes after 1988 should be construed broadly. (DOI Br. at 21 (citing *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty for W. Div. of Mich.*, 369 F.3d 960, 971-72 (6th Cir 2004)). In *Grand Traverse* the court found that the tribe had maintained a government to government relationship with the U.S. until 1872 when the relationship was "improperly severed." Id. at 961-62. The Tribe was subsequently restored through the federal acknowledgment process. Unlike the Grand Traverse Band, the UKB is not a "restored" tribe. In *City of Roseville v. Norton*, 348 F.3d 1020, 1030-32 (D.C. Cir. 2003), the Auburn Indian Restoration Act restored the Tribe "to federal recognition as an Indian tribe and authorized the creation of a new reservation on its behalf." Id. at 1021 DOI also references section 134 of Public Law No. 107-63, 115 Stat. 442-443 (2001) as a reaffirmation by Congress that "[t]he authority to determine whether a specific area of land is a 'reservation' for purposes of [IGRA] was delegated to the secretary of the Interior on October 17, 1988. (DOI Br. at 21 n. 4.) In 2008,

the Secretary published department regulations defining "reservation" and "former reservation". *See* 25 C.F.R. 292.2.

C. Defendants Disregard Controlling Case Law.

DOI maintains that (1) the 2012 Decision is "not inconsistent with" the three Northern District cases cited in the Opening Brief, (2) the ASIA "did consider these decisions," and (3) the ASIA "readily distinguished them." (DOI Br. at 22) DOI also states that in 2008, an Associate Solicitor "found that Federal courts have not addressed the merits of whether the Cherokee Nation has exclusive jurisdiction over the former Cherokee reservation, and the issue remains unsettled." (DOI Br. at 23 (citing AR4933-35).)

DOI contends that this Court held in *United Keetoowah Band v. Secretary of the Interior*, No. 90-C-608-B (N.D. Okla. May 31, 1991), that the Cherokee Nation was an indispensable party to the UKB's claims to a "statutory right" to "certain Indian lands" within the Cherokee Nation Treaty Territory "to which the Cherokee Nation held title," and states that holding does not apply to the Tract owned by the UKB. (DOI Br. at 22.) This is a grossly oversimplified version of that decision. In arriving at its decision that the Nation was an indispensable party, the Court noted *DOI's position* that the Nation is the tribe with sovereign authority over Indian country lands within its Treaty Territory. Doc.30-17, AR458-459. The Court further noted the lack of distinction between the Cherokee Nation at the time of Oklahoma statehood and the current Cherokee Nation of Oklahoma, citing several cases. Doc. 30-17,AR463, AR467, AR469.[22]

[22] The UKB claims that the Plaintiffs have misrepresented that the Court found in *United Keetoowah Band* that the "old" Cherokee Nation lands are under the jurisdiction of only one sovereign, the Cherokee Nation. (UKB Br. at 12.) Plaintiffs note that a more accurate statement is that the Court found that the *Secretary* had determined that the subject lands involved were under the jurisdiction of the present Cherokee Nation, "not the UKB." Doc. 30-17, AR463.

DOI tries to distinguish *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992), Doc. 32-3, AR1256-1269, *aff'd*, 992 F.2d 1073 (10th Cir. 1993), Doc. 30-17, AR519-524, by stating that it merely held that "the prohibition against alienation in UKB's charter did not make the UKB's land 'Indian Country.'" (DOI Br. at 22.) This completely ignores the significance of *Buzzard* to the present case. (*See* Pls.' Br. at 29-31.) In *Buzzard*, the Court found no treaty or statutory authority supporting the UKB's claim in that case that it was "heir" to unallotted lands within "the original Cherokee Indian Reservation." *Buzzard*, 992 F. 2d at 1075. While the Court noted DOI's consistent recognition that lands within the Treaty Territory are under *the Nation's* "exclusive jurisdiction and control," the decision did not blindly rely on the DOI's then-position. Instead, the Court expressly found that the 1946 Act simply recognizes the UKB as a "band of Indians residing in Oklahoma," does not set aside a reservation for the UKB, and does not acknowledge the UKB's jurisdiction over the Nation's Treaty Territory. The Court also found that nothing in section 3 of the OIWA created or recognized the UKB's claim to the "original reservation." Doc. 32-3, AR1263. DOI states that *United Keetoowah Band v, Mankiller*, No. 92-C-585-B (N.D. Okla. Jan. 27, 1993, *attached to and aff'd,* 2 F.3d 1161 (10th Cir. 1993), 1993 WL 307937, Doc. 30-17, AR526-531 "simply relied on the analysis in the *Buzzard* decision, and in any event was dismissed on sovereign immunity." (DOI Br. at 22.) DOI also states that the "analysis" in the Associate Solicitor's 2008 memorandum "found that the final opinion was based on the *Buzzard* district court opinion and

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However, the Court nevertheless reached the conclusion that the "old" Cherokee Nation and the "new" Cherokee Nation are the same, and found that the Nation's interests were sufficient to required dismissal absent the Nation's joinder in the case. It is also noteworthy that, contrary to UKB claims that there have been only a few "Secretarial" decisions concerning the Nation's exclusive jurisdiction, (UKB Br. at 13), the Nation has provided numerous examples of departmental decisions regarding the Nation's jurisdiction in its merits brief. Pls.' Br. at 36, n. 39 and 44, n. 42.

was decided before the Court of Appeals decided the appeal. (*Id.* at 23 (citing AR4933-35).) This explanation is wholly inadequate. (*See* Pls.' Br. at 20-31; 42-43.) The Court noted in *Mankiller* that it had "previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation," and that it had "previously determined . . . that the Cherokee Nation's sovereignty is preeminent to that of the UKB in Cherokee Nation Indian Country." *Id.* at AR529. The Court concluded that principles of res judicata and collateral estoppel barred the UKB from again raising the merits of its successor-in-interest claim. Doc. 30-17, AR529. The UKB is equally barred from raising the same claims, under pretext of different terminology, in the present case.

In summary, this Court's decisions in the *United Keetoowah Band*, *Buzzard*, and *Mankiller* cases are controlling. The UKB was a party in all three cases, and is precluded from yet again challenging the Cherokee Nation's exclusive tribal governmental authority over Indian country – whether that be restricted allotments or trust lands – within its Treaty Territory. DOI was a party in *United Keetoowah Band* and in *Mankiller*, and took a position supporting the Cherokee Nation's exclusive tribal authority over Indian country within its Treaty Territory. There is no basis for DOI's claim to superior agency expertise in its new position seeking to override these court decisions. *C.f. Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent"). Furthermore, it is noteworthy that the Department's position in the present case is legally inconsistent with the United States' defense in a pending UKB claims suit involving UKB claims of successorship to Cherokee Nation trust resources and seeking damages against the United States. In that case, the United States relies on the legal precedents established in *Buzzard* in its Answer. *See United*

Keetoowah Band of Cherokee Indians in Oklahoma v. USA, U.S. Ct. Fed. Claims, Case No. 06-cv-936, Doc. 98, August 17, 2012, United States' Answer at 7 ("To the extent that Plaintiff asserts claims that it or its privies asserted or could have asserted in a prior adjudication in which a court of competent jurisdiction entered a final judgment, including but not limited to, *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir.), *cert. denied sub nom, United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Comm'n*, 510 U.S. 994 (1993), those claims are barred in whole or in part by the doctrines of *res judicat*a and/or *collateral estoppel*.")

DOI's attempt to distinguish *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 142 F.3d 1325 (10th Cir. 1998) similarly falls short. (DOI Br. at 26.) DOI notes that the court in that case relied on the absence of any treaty, executive order or other "affirmative" Congressional actions to legitimize the presence of the Absentee Shawnee Tribe on the subject land. That is also the case for the UKB. There is simply no merit to DOI's argument that the UKB is a successor government protected by Cherokee Nation treaty rights, simply because the ancestors of current members of the UKB were part of the Cherokee Nation when the Cherokee Nation Treaty Territory was established.

DOI rejected the "successor-in-interest" theory that it had advanced in the June 2009 Decision, and substituted a "shared reservation" theory for that theory in the 2012 Decision. Because even DOI admits that the UKB is not a successor-in-interest to the Cherokee Nation, there is no basis for an argument that the UKB "shares" the Nation's "former reservation" established as a result of treaties with the Cherokee Nation. DOI's repeated assertions that the 1946 Act expressly authorized the formation of a completely separate UKB government "from the citizens of the other [Cherokee Nation]" is simply wrong. DOI Br. at 5. The 1946 Act has none of the attributes of a federal recognition statute, does not require separate citizenship in the

UKB and the Cherokee Nation, and did not contemplate or mention even the possibility of a shared tribal territorial area.

DOI's efforts to distinguish *Kialegee Tribal Town of Oklahoma v. Muskogee Area Director,* 19 I.B.I.A. 296 (1991) are equally unpersuasive. (DOI Br. at 26.) DOI implies that the Kialegee case was different from the present case because the Kialegee tribal town did not contend that it had "its own former reservation" and did not produce any "evidence" to support such a finding. However, DOI fails to explain the existence of any "evidence" to support a finding that the UKB has "its own" [or shared] "former reservation," and simply returns to DOI's bald conclusion that UKB shares the Nation's "former reservation."

D. Defendants Have Not Provided Sufficient Legal Support for Its Position that When DOI Acquires Land in Trust for a Tribe, that Tribe is Automatically Conferred with Jurisdictional Powers Over the Tract.

DOI makes no effort to explain how the UKB possesses governmental power over Indian country within the Treaty Territory, merely stating that "this finding was implicit in Interior's determination that the parcel was located within the UKB's former reservation" and in DOI's "later discussion of Part 151.10 that the UKB possesses territorial jurisdiction." (DOI Br. at 24.) DOI cites the 2012 Decisions, AR21-22, as authority, with no further discussion. (*Id.*) The UKB claims that placement of the Tract into trust "will satisfy IGRA's jurisdictional requirement." (UKB Br. at 28.) This circular argument should be rejected. If the UKB is correct, then there would have been no need for IGRA's express requirement that a tribe seeking authorization to conduct gaming on "Indian lands" (including trust lands) must possess governmental power over the land and must exercise governmental power over the land. The UKB cannot exercise governmental power because it does not have governmental power within the Nation's Treaty Territory over Indian country.

UKB apparently misunderstands the significance of Plaintiffs' statements that there is nothing in the UKB Constitution or the UKB Corporation Charter mentioning territorial jurisdiction. (UKB Br. at 30.) Plaintiffs do not argue that a tribe has no territorial jurisdiction if its organizational document does not reference a territorial area. Rather, Plaintiffs merely note that under the "unique" history of the UKB, the exercise of territorial jurisdictional was not contemplated by the 1946 Act and the resulting 1950 Constitution and Charter.

The UKB attempt to distinguish its background from that of the Kialegee Tribal Town to try to strengthen its arguments regarding governmental authority also fails. (UKB Br. at 31.) The UKB correctly states that it was "never a political entity" (unlike the Kialegee Tribal Town) and that the UKB was never "subservient to the historic Cherokee Nation." However, the mere fact that the UKB was never a political entity with any type of governmental powers within the Nation's Treaty Territory renders its claim even weaker than that of the Kialegee.

III. THE DEFENDANTS HAVE NOT ESTABLISHED AS A MATTER OF LAW THAT CHEROKEE NATION CONSENT TO THE TRUST ACQUISITION IS NOT REQUIRED AND HAVE NOT ADDRESSED THE ARBITRARY AND CAPRICIOUS NATURE OF ITS DETERMINATION REGARDING CONSENT.

DOI correctly states that the "1998 appropriations rider," Interior and Related Agencies Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-246 (1998) (referred to as the "1999 Appropriations Act" by Plaintiffs, Pls.' Br. at 37) "provides that no *appropriated funds* shall be used to acquire land into trust within the former *Cherokee reservation* without *consulting* with the Cherokee Nation." (DOI Br. at 12.) Although the ASIA did not mention the "1998"/1999 Act at all in the 2012 Decision, and discussed it in the June 2012 Decision only within the context of the consent requirements in 25 C.F.R. § 151.8, DOI now relies on that statute to support its conclusion that "the Cherokee Nation does not have exclusive jurisdiction

over the former reservation." (DOI Br. at 25.) This is yet another demonstration of DOI's inconsistency and implausibility in the 2012 Decision.

Furthermore, the legislative history of the "1998"/1999 Act does not support DOI's simplistic reasoning that "if the Cherokee Nation had exclusive jurisdiction over the former Cherokee reservation, then the appropriations rider would have been a nullity." (DOI Br. at 12.) As noted by DOI, the wording in the "1998"/1999 Appropriations Act is different from wording involving the Cherokee Nation in a 1991 appropriations act, in which Congress appropriated funds for "operation of Indian programs by direct expenditure, contracts, cooperative agreements and grants." Pub. L. No. 102-15, 105 Stat. 990, 1003-1005 (1991). The wording in the 1991 legislation restricts expenditures of federal funds as follows:

> That until such time as legislation is enacted to the contrary, none of the funds appropriated in this or any other Act for the benefit of Indians residing within the jurisdictional service area of the Cherokee nation of Oklahoma shall be expended by other than the Cherokee nation, nor shall any funds be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without the consent of the Cherokee Nation.

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The different wording in the subsequent (and separate) "1998"/1999 Appropriations Act, which references "consultation" rather than "consent," does not have the significance attributed to it by DOI.[23] The one constant in both appropriations acts is that each act applies only to funds appropriated under that act. Thus, even if DOI's interpretation of the "1998"/1999 Act is correct

[23] In a completely different portion of its brief, DOI again raises the "1998"/1999 Appropriations Act as "proof" that consent is no longer required for the taking of land into trust within the Cherokee territorial jurisdiction, stating: "If Congress believed taking land into trust for a different tribe violated Cherokee Nation's sovereignty and only the Cherokee Nation could assert sovereignty over land within the boundaries of the former reservation, it would not have left open the possibility of Interior taking land-into-trust for a tribe, not Cherokee, within the former reservation's boundaries." (DOI Br. at 37.) Such an interpretation is contrary to the very strong presumption that appropriations acts do not amend substantive laws. (*See id.* at 38.)

(which it is not, *see* Pls.' Br. at 37-38), any limitation on the consent requirement in 25 C.F.R. Part 151 would have applied only in those instances where the land to be taken into trust was purchased with funds allocated under the "1998"/1999 Appropriations Act. Neither DOI nor the UKB allege that any federal funds were used to purchase the Tract.[24]

The 2012 Decision is also contrary to the Cherokee Treaty of 1866. Article 15 of the 1866 Treaty requires the Cherokee Nation's *consent* prior to settling any other Indian tribe within its boundaries. The allocation of Indian country (here, trust land) to the UKB Corporation within the Cherokee Nation's treaty territory is a clear violation of the treaty.

In the 1866 Treaty, the United States reconfirmed the Cherokee Nation's sovereign authority and rights of self-government—rights which were to be protected against the "intrusion" of all unauthorized citizens without Cherokee Nation consent. These Treaties mean that the Cherokee Nation possesses exclusive sovereign authority over trust lands within the boundaries of the Nation's treaty territory and holds a veto power over the entry of other tribes upon such lands. That is precisely what the Cherokees believed that they were receiving. Indian treaties are to be interpreted liberally in favor of the Indians, *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979); *Choctaw Nation v. United States*, 318 U.S.423, 432 (1943), and any ambiguities are to be resolved in their favor, *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *see also Cnty. of Yakima v. Confederated Tribes & Bands*

[24] The UKB cites to the Congressional Record for the proposition that "the modification in this policy was meant to allow the Bureau of Indian Affairs to *address the status of the UKB*." (UKB Br. at 37 n. 25 (emphasis added).) The Congressional Record accompanying the "1998"/1999 Appropriations Act states: "The Committees have included language that allows the Bureau of Indian Affairs to deal with the United Keetoowah Band of Cherokees and the Delaware Band of Indians on issues of funding, but prevents these tribes from establishing trust holdings within the *Cherokee's original boundaries* without Cherokee consultation." H.R. Conf. Rep. No. 105-825, 1209, 105th Cong., 2d Sess. (1998). (emphasis added) This language clearly supports the Nation's position that the Appropriations Act's reference to consultation only involved use of federal funding appropriated under that Act for trust acquisitions.

of Yakima Nation, 502 U.S. 251, 269 (1992). The ASIA's 2012 Decision violates the rights of the Cherokee Nation as confirmed in the 1866 Treaty.

IV. THE DEFENDANTS HAVE FAILED TO ADDRESS THE ARBITRARY AND CAPRICIOUS NATURE OF THE 2012 DECISION'S FINDINGS REGARDING JURISDICTIONAL CONFLICTS.

DOI has not responded to the Plaintiffs discussion of the arbitrary and capricious nature of its consideration of jurisdictional conflicts under 25 C.F.R. § 151.10, and offers no explanation regarding the 2012 Decision's misstatement that the "Regional Director believes there is an adequate foundation" for resolving jurisdictional disputes," and its conclusion that "we concur." (*See* Pls.' Br. at 41-44; and Pls.' Br., App. 1, Tab 1, Doc. 28-4, AR24.)

Instead, DOI now implies that there need be no consideration of jurisdictional conflicts if tribes "share" a reservation. DOI relies heavily on the addition of subsections (f) and (g) in the 1994 amendments of § 476 of the IRA for this idea. (DOI Br. at 11, 24-25.) Although both the June 2009 Decision, Doc. 35-4, AR3239, and the 2012 Decision, Doc. 28-4, AR24, cited § 476(g) of the IRA only in their discussion of jurisdictional conflicts under 25 C.F.R. § 151.10(f), DOI now relies on the § 476 amendments as support for its "shared reservation" theory. [25] DOI denies that its interpretation of the amendments of § 476 would require DOI to recognize any federally recognized tribe's attempt to acquire land in another's jurisdictional area—although that is exactly what DOI is proposing in the present case. (DOI Br. at 25.) Instead of explaining its interpretation of the 1994 amendments to §476, DOI makes the unsupported claim that DOI

[25] DOI (at 19-27) inexplicably discusses IRA § 476 in its arguments concerning its theory of a shared "former reservation" under IGRA, rather than in the context of jurisdictional conflicts.

examined the "history" of the UKB and the Cherokee Nation[26] and "found that they both had ties to the historic Cherokee territory." (*Id.*) DOI concludes, somewhat nonsensically, that its interpretation of § 476 "merely recognizes that two tribes may share a jurisdictional area," again citing the June 2009 Decision, AR[36]37-[36]38. (*Id.*) DOI has not even attempted, and has completely failed, to respond to any possible significance of § 476(f) regarding its duty under 25 C.F.R.§151.10(f) to consider jurisdictional conflicts. (*See* Pls.' Br. at 44-46.) Furthermore, DOI's position that §§ 476(f) and (g) require it to make a finding of a shared "former reservation" is contrary to law.

V. THE 2012 DECISION FAILED TO PROPERLY CONSIDER WHETHER THE BIA IS SUFFICIENTLY EQUIPPED TO DISCHARGE THE ADDITIONAL RESPONSIBILITIES THAT WOULD RESULT FROM THE TRUST ACQUISITION AND IS ARBITRARY AND CAPRICIOUS.

The administrative record clearly shows the ASIA abused his discretion in failing to adequately consider all relevant facts with regard to 25 C.F.R. § 151.10(g), which requires consideration of "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status." In response, DOI states that while the Regional Director found "the additional duties may be a hardship unless additional appropriations or budget allocations were made, 'the Region is, nevertheless, capable of providing these services'." (DOI Br. at 39.) The ASIA's determination that the BIA is equipped to discharge the additional responsibilities resulting for the acquisition of the gaming tract into trust for the UKB is not supported by the record and was arbitrary and capricious, an abuse of discretion and contrary to law under the APA.

[26] DOI cites the 2012 Decision, AR20, for purposes of its claimed historical analysis. There is no historical analysis on that page or anywhere else in the 2012 Decision.

The ASIA did not identify where the Regional Director would obtain additional funds. But it is clear the only place the funds could be obtained would be through a reduction of the funding currently received by the Cherokee Nation. The Cherokee Nation has provided and continues to provide health, education, law enforcement and social services to all Indian people and all Indian country within the Nation's treaty territory. As the 2012 Decision states, all BIA programs within the Nation's treaty territory, and all associated funding for such programs, have already been transferred to the Nation pursuant to a self-governance compact under the ISDA, and as a consequence the Tahlequah BIA Regional Office (which previously administered such programs) has been closed. Doc. 28-4, AR25.

Any such federal funds obtained by UKB threaten to diminish the funds that would be provided to the Nation and to degrade the ability of the Nation to provide services to all Indians on the Nation's treaty territory. Such payments to UKB also would result in unnecessary and duplicative costs to provide the same services already being provided by the Nation, to the detriment of the intended beneficiaries of such services. The Department's failure to consider the impact of the proposed trust acquisition on the Nation and on its continued ability to receive funds under the Indian Self-Determination Act and to provide services under that Act to Indians on the Nation's treaty territory was arbitrary and capricious, an abuse of discretion and contrary to law under the APA.

CONCLUSION

For the reasons set forth in Plaintiffs' Opening Brief and herein, this Court should grant Plaintiffs' request for declaratory judgment and injunctive relief as sought in their Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I electronically transmitted the foregoing document to the Clerk of the U.S. District Court for the Northern District of Oklahoma using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

s/William David McCullough
William David McCullough

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